1980

Club Stanyon Street, A Utah Non-Profit Menbership Corporation v. Utah Liquor Control Commission : Brief of Petitioner

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

CLUB STANYON STREET, a Utah non-profit membership corporation,	)	
Petitioner,	)	
vs.	)	Case No. 16384
UTAH LIQUOR CONTROL COMMISSION,	)	
Respondent.	)	

Brief of Petitioner

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Brief of Petitioner

NATURE OF THE CASE

This case arises from an administrative proceeding before the Utah Liquor Control Commission (hereinafter referred to as the Commission) in which the Commission purported to determine whether Petitioner had violated provisions of the Liquor Control Act or any of the regulations of the Commission.

DISPOSITION BEFORE THE COMMISSION

After refusing to comply with the discovery requests of the Petitioner, the Commission entered its evidence and the Petitioner then entered the evidence it had been able to obtain. Thereafter, the Commission did make written Findings and Conclusions, and a written Order which found "a violation of Utah Code Annotated, Section 16-6-13.1(9) and Commission Regulation A96-01-5(6)(a) occurred," and ordered a penalty of a one week suspension of the State liquor store and consumption licenses of the Club Stanyon Street. All references to the script of that proceeding are in parentheses and preceeded by the letter "T", and all references to other portions of the record are preceeded by the letter "R".

NATURE OF THE RELIEF SOUGHT

In this action, Club Stanyon Street asks this Court to determine the abuses of discretion and excesses of jurisdiction of the Utah Liquor Control Commission, to properly construe the statutes under which the Commission purported to act, to determine that the constitutional rights of the Club Stanyon Street have been violated, for an Order requiring the Commission to vacate its Order of March 7, 1979 and to further order the Commission to expunge its records with regard to the alleged violations of November 14 and 22, 1978 and for such other relief as may seem appropriate to the Court.

STATEMENT OF FACTS

This action began when charges were originally brought by the Liquor Law Enforcement Division of the Department of Public Safety, commonly referred to as the Liquor Division. It was alleged that on November 14 and November 22, 1978, an agent from the Liquor Division entered the premises of the Club Stanyon Street and purchased an alcoholic beverage without being a member of the Club Stanyon Street. At the time the agent allegedly entered the premises, he did not have a search warrant and did not divulge or disclose his identity or the reason for his presence to anyone within the Club, and no one within the Club was aware of such an alleged purchase until six (6) weeks after it allegedly occurred.

The purchase of alcoholic beverages is not, per se, a violation, but only the purchase of alcoholic beverages by nonmembers of the Club. Every week there are between 3,000 and 6,000 valid transactions in the Club Stanyon Street wherein alcoholic beverages are legally and lawfully sold.

Six weeks after the alleged violation, when the charges were brought against the Club Stanyon Street, the manager of the Club immediately requested

permission for his employees who were on duty on the nights in question to view the liquor agent so that they could attempt to refresh their memories as to what had transpired. In addition, counsel for Plaintiff further submitted discovery in an attempt to determine the facts so that evidence and testimony could be obtained and reviewed for the scheduled hearing. All discovery requests by the Club Stanyon Street and its counsel were ignored and no response was received thereon, and no answers to the discovery were received by counsel for Plaintiff.

A hearing was finally held on March 7, 1979 wherein the only witness to testify regarding the alleged incident was the liquor agent. Because of the time interval between the alleged incident and the time the Club was given notice of that incident, and further because there had been thousands of sales to members of the Club during that period, no officer, agent or employee of the Club had any recollection of the alleged incident and could therefore not testify regarding the specific facts alleged. In fact, they could not even testify whether the agent was or was not in the Club on any occasion (T.50).

There were, however, not even any allegations that the manager or any officer or director of the Club had anything to do with the alleged sale, but instead it was clear that if the alleged incident did occur that any unlawful sales were made by waitresses who had no managerial authority and had clearly been instructed by the management of the Club to serve drinks only to members of the Club. In fact, Mr. Roy Kohler, the manager of the Club, testified that he had issued written directions to the employees that the Club was only for the use of its members, that it was a private club where membership cards were required, that there would be no exceptions even for the personal friends of employees, and that every employee was responsible for his or her own section to insure that everyone in the section was a member or a guest of a member (T.43).

He also testified that weekly employee meetings were held wherein it was emphasized to only permit admittance or sales to members of the Club, and that he also emphasized the same thing every night when the waitress would pick up the money she would use to make change that night, and he described the repetition of those statements every night as being like a record (T.49).

The Club did in fact attempt to follow the law, and the Commission's Compliance Supervisor, Mr. Joe Coccimiglio, testified that in the eighteen months prior to the hearing the Liquor Division had performed eighteen (18) premise checks, plus two (2) open inspections of the Club, and in twenty (20) inspections of the Club, the agents noted the alleged violations involved in the proceeding plus one other violation of a similar nature which occurred on August 24, 1978. In the other seventeen (17) inspections during the prior eighteen (18) months, the agents either could not gain admittance to the Club or did not note any violations (T.42-45). In addition, after these alleged violations but before the hearing, the Liquor Division made at least three (3) and possibly four (4) additional inspections of the Club, and the agents were not able to gain admittance to the building without a membership card (T.62).

As to the alleged incidents themselves, the first alleged sale on November 14, 1978 occurred when the Club was full at about 7:30 p.m. by a waitress named Cathy (T.33-34), and Mr. Kohler testified that Cathy had been employed by the Club for about 3 to 4 years and was very concientious (T.50). The agent testified that he had been to the Club with a member of the Club on a previous occasion (T.29-30). However, it would admittedly be speculative to to attempt to determine whether or not the waitress remembered the agent from a prior visit, whether the rush of a full Club during a busy period, or whether just a mental lapse caused the incident, if it did in fact occur.

The second alleged incident occurred when the agent was allegedly served a drink by a waitress named Pamela Hendy on November 22, 1980, which was the first day that Pamela Hendy was employed by the Club Stanyon Street (T.51). Even though it was her first day of employment, if the alleged incident did occur, it was because the bartender took the order while the waitress was at the restroom, and the waitress then served the drink when she returned (T.35-36). While it may require some speculation, it is reasonable to assume that the bartender believed the waitress had already made a determination of membership while the waitress believed that the bartender had determined the agent was a member in the Club.

When the liquor agent made his alleged inspections, he did not have a search warrant (T.11 and 23) and did not, in any manner, identify himself or the purpose of his visit.

Also, at the hearing on March 7, 1979, the Commission admitted into evidence, and presumably considered in its decision, the State Toxicaligist's reports on samples allegedly taken at each of the alleged incidents without any witness to testify concerning those reports or the contents or accuracy of those reports.

ARGUMENT

POINT I

THE ALLEGED ENTRY INTO THE CLUB STANYON STREET FOR THE PURPOSES OF ENCOURAGING AND CAUSING A VIOLATION OF THE UTAH LIQUOR CONTROL ACT CONSTITUTED A VIOLATION OF THE CLUB STANYON STREET'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, SECTION 14 OF THE UTAH CONSTITUTION.

When the agent allegedly entered the Club Stanyon Street, he did not have, and had never obtained, a search warrant to search or inspect the premises,

and he never did present any credentials or exhibit any identification to any official or employee of the Club.

The conduct of the agent was, therefore, in violation of the Club Stanyon Street's rights to be free from warrantless searches.

The status of the law on this point was very capably summarized by Christine M. Durham, District Judge, in an unreported Memorandum Opinion issued from the Third Judicial District Court in and for Salt Lake County in the case of V-1 Oil Company, et al vs. Salt Lake City, et al., C79-75, dated the 8th day of February, 1979. Although it is somewhat lengthy, because of its quality, impartiality, and relevancy, a substantial portion of that opinion is as follows:

> "The constitutionality of warrantless inspections for various purposes has been reviewed several times and very recently by the United States Supreme Court. In Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967), the Court reviewed ordinances permitting warrantless inspections of personal residences (Camara) and of commercial premises (See). In Camara, the Court overruled Frank v. Maryland, 359 U.S. 360, which had upheld warrantless inspections for the purposes of locating a suspected public nuisance on the theory that municipal fire, health and housing programs "touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion" 359 U.S., at 367. The Camara Court disagreed because of the criminal processes available for enforcement of fire, health, and housing codes, as well as criminal penalties for refusal to permit inspection. The Camara Court dealt with the public interest argument, advanced by Defendants in the instant case, as follows:
>
> > . . . we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant . . . It has nowhere been urged that fire, health and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive
>
> 387 U.S., 533.

In Camara, the governmental interest was described as the prevention of "even the unintentional development of conditions which are hazardous to public health and safety", 387 U.S., at 535, an interest indistinguishable from that in question in this case. Routine area inspections would not be precluded by the requirement of a warrant procedure after entry has initially been refused, the Court held, because "if a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant". 387 U.S. at 539. The Court specifically noted that the requirement of a warrant procedure "does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect". 387 U.S., at 540.

In See v. City of Seattle, supra, a companion case to Camara, the Court extended his holding in Camara to similar inspections of commercial premises not used as private residences. The inspection involved was a routine inspection for fire and safety hazards, and the Court held "that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled, through prosecution or physical force within the framework of a warrant procedure". 378 U.S., at 545.

Most recently, in the 1979 case of Marshall v. Barlow's, Inc., 98 S. Ct. 1816, the Court applied its holdings in Camara and See to inspections authorized by the Occupational Safety and Health Act of 1970. That opinion distinguishes a parallel line of cases permitting warrantless searches in certain industries which "have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise". 98 S. Ct., at 1821. Liquor and firearms constitute such industries (See the Colonnade Catering Corp. v. United States, 397 U.S. 72, 1979, and United States v. Loarn Anthony Biswell, 406 U.S. 311, 1972), and a recent federal district court decision includes coal mining within that limited class. See Marshall V. Donofris, No. 78-2667, OSHR, Nov. 14, 1978, p. 1175, reported in 47 Law Week 2411. Defendants here argue that food preparation is such a heavily regulated industry, but aside from the base assertion, no facts or historical review is offered to show the kind of regulation and governmental oversight (federal in nature) found in Colonnade and Biswell, supra. Furthermore, the very restrictive view of such exceptions to general warrant requirements taken by the Utah Supreme Court is evidenced by two cases involving establishments which retail liquor. In Salt Lake City v. Wheeler, 466 P. 2d 838, 1970, and Utah v. Salt Lake City, The Vagabond Club v. Salt Lake City, 445 P. 2d 691, 1968, the Utah Supreme Court clearly held that a city regulatory licensing scheme involving

> warrantless searches of non-profit clubs was unconstitutional (Vagabond), and that a statute permitting periodic police inspections without warrants of premises where liquor is consumed is likewise offensive to the constitutional protections afforded by the Fourth Amendment. The Court reviewed the Colonnade decision, which had just been completed by the United States Supreme Court, and concluded "the case lends no comfort to the City", 466 P. 2d, at 840. No different result can be required here, where the rationale which supported Colonnade and Biswell is even less available than it was in Wheeler and Vagabond. This Court therefore finds that Section 100-13-202, Revised Ordinances of Salt Lake City, is unconstitutional to the extent it permits warrantless searches of commercial premises without consent. Plaintiffs are entitled to a preliminary injunction restraining the Defendants from conducting or attempting to conduct warrantless health inspections of their gasoline station unless consent has been obtained, or from prosecuting or penalizing Plaintiffs in any fashion pursuant to related ordinances for failure to permit such warrantless inspections.

While the standards for warrantless searches by the United States Supreme Court are strict, the standards for such warrantless searches as established by the Utah Supreme Court are even more strict. In State v. Salt Lake City, (Vagabond) 21 Utah 2d 318, 445 P.2d 691 (1968) this Court said:

> In the Camara case, the court observed that the question was not whether an inspection may be made, but whether it may be made without a warrant. The court held that searches of this kind "are significant intrusions upon the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in Frank v. Maryland, 359 U.S. 360, 79 S.Ct. 804, 3 L.Ed.2d 877 and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendemnt's protections."
>
> In See v. Seattle, the court held that the basic component of a reasonable search under the Fourth Amendment--that it is not to be enforced without suitable warrant procedure--is applicable to business as well as residential premises. Therefore, an entry upon commercial premises not open to the public may only be compelled within the framework of a warrant procedure. (Emphasis added.)

Also, in Salt Lake City v. Wheeler, 24 Utah 2d 112, 466 P.2d 838 (1970), this Court again struck down a city ordinance which permitted warrantless searches. In Wheeler, the conduct authorized by the ordinance was nearly identical to

the actual conduct of the agent in these alleged violations. The ordinance in that case provided:

> "The Police Department shall be permitted to have access to all premises licensed or applying for license, under this chapter and shall make periodic inspections of said premises and report its findings to the Board of Commissioners."

In holding that ordinance to be unconstitutional, this Court stated:

> "It seems obvious from a casual reading of the ordinance that, of all the municipal agencies, the police department alone is accorded the right of entry without a search warrant, to "inspect" any or all the premises for which the license is issued, without reservation or restriction as to the private or public portions thereof, without any specified protection against a plenary power to prowl the premises. It is reasonably foreseeable that under some circumstances, where a warrantless entry may have been accomplished, an erstwhile right of an accused to suppression of evidence or his right of immunity from selfincrimination well might be foreclosed simply because the word "inspect" instead of "search" may be employed in the ordinance. Counsel implies that "inspection" may be something other than "search" in a Fourth Amendment sense. The Authorities seem to dispel any such distinction by making the two words synonymous in both the ordinary and constitutional senses. Id. at 839.

The applicable statutes and regulations purport to require the same access for liquor agents as the city ordinance in the Wheeler case required for the Police Department. Section 16-6-13.7(9), Utah Code Annotated, 1953, as amended, provides:

> ". . . Any member of the council, the commission or any peace officer or investigator or examiner authorized by the commission, the council or the director of the Liquor Division of the Department of Public Safety, shall, upon presentation of his credentials, be admitted immediately to the club house or club quarters and permitted without hindrance or delay, to inspect completely the entire club house, club quarters, and all books and records of the licensee, at any time during which the same are open for the transaction of business to its members, and each member utilizing, or claiming the right to utilize, a locker as provided in subdivision (18) of this section, shall be deemed to agree and consent to permit any such person to be admitted and to inspect the contents of his locker." (emphasis added).

The Commission's own Rules and Regulations adopt the identical standard at A96-01-5.4a, which provides:

"Inspection.

Representatives of Commission, the Citizens Advisory Council, the State Division of Liquor Law Enforcement and other law enforcement agencies shall be admitted to a locker club without hindrance or delay provided they exhibit proper identification, and shall, while the club is open or while members or guests or visitors are present, have the right to inspect:

(1) The premises of the club;
(2) Any locker therein;
(3) Current member and guest list and authorized guest log of the club, and
(4) The club's current audited statement." (Emphasis added)

In view of this Court's prior decisions in Wheeler and Vagabond, supra Section 16-6-13.7(9) and Regulation A96-01-5.4 may well be invalid; however, the are not being directly challenged in this Appeal, because the liquor agent did not present any credentials or identification, and therefore the agent was not acting in accordance with the statute and regulation.

In addition to the statute and regulation, the Utah Liquor Control Commission does extract a consent form from every applicant for a license from the Commission. However, the consent form does not expressly dispense with the statutory and regulatory requirement of presenting credentials and exhibiting proper identification before entering the Club, but even if the consent form did dispense with the identification requirement, if municipalities cannot by ordinance, and the State cannot by statute, provide for a waiver of one's rights respecting warrantless searches and seizures, then the Commission certainly may not require a waiver of those rights by extracting a consent form as part of the licensing process by the threat of denial of a license. Nevertheless, the consent form as extracted only provides a consent to permit admittance to "inspect completely the entire club house, club quarters, all books and records of said corporation and any locker therein," and does not consent to a surreptitious transactional testing of the Club's procedures for preventing unauthorized purchases.

CONCLUSION OF POINT I

The conduct of the agents in this case was in violation of Petitioner's rights to be free from warrantless searches. The statute, regulations and consent form, even if permissible, do not validate the agents' conduct in this case. The Commission should be reversed and its order vacated.

POINT II

THE STATUTORY PROVISION WHICH THE CLUB STANYON STREET WAS FOUND TO HAVE VIOLATED, UTAH CODE ANNOTATED SECTION 16-6-13.1(9) DOES NOT PROSCRIBE ANY ACTIVITY OF THE CLUB, BUT ONLY PROSCRIBES THE ACTIVITY OF THE PERSON MAKING THE PURCHASE.

The Commission purported to find a violation of Utah Code Annotated Section 16-6-13.1(9). That section provides:

> No person other than a member or guest who holds a valid guest card issued pursuant to the provisions of subsection 16-6-13.7(13) may make any purchase from a State store located on the premises of a social club, recreational, athletic or other kindred associations. (Emphasis added).

On its face, the subsection regulates the conduct of the persons purchasing liquor. The statute is not ambiguous; it is not vague. In fact, it is quite clear. On its face, the provision applies to any person who makes a purchase from a private club. Additionally, the legislative history supports such a construction.

Subsection (9) was added to this section in 1977. The preface to the full section was also changed, although the West supplement fails to reflect that change. As published in Laws of Utah, 1977 - the preface as adopted reads:

> 16-6-13.1 Clubs storing or permitting consumption of liquor on premises - Bond - Filing of articles, bylaws and house rules - Federal malt liquor revenue stamp - Establishment of State liquor store - Restrictions - Member or guest card required for purchases - Definitions of terms - License constitutes consent of local authority. (Emphasis added).

When it enacted the amendment, the legislature intended to add a regulation not already covered by the section subject matter.

The purchaser's activity is already a matter of criminal control. The Utah Code Annotated Section 32-7-11 provides:

> "Except as provided in this act, no person shall, within this state, by himself, his clerk, employee or agent attempt to purchase, or directly or indirectly or upon any pretense or upon any device, purchase or in consideration of the sale or transfer of any property, or for any other consideration, or at the time of the transfer of any property, take or accept any alcoholic beverage from any other person." (Emphasis added).

As a parallel to those criminal provisions, the legislature added a provision to this title to regulate the conduct of purchasers. By adding subsection (9) and the corresponding topic heading, the legislature amended the statute to provide that purchasers be regulated.

The new subsection follows several other general provisions. Some of those other provisions regulate the licensee in its bonding and other documentary requirements. (Subsections 16-6-13.1(1) through (3) and (6)). Some regulate and specify Commission authority. (Subsection 16-6-13.1(5) and (7)) One subsection expressly restricts licensee activity including sales, and provides that no vendor, officer, employee or other agent of a licensee shall furnish liquor to (1) any minor, (2) any person actually, apparently or obviously drunk, (3) any known habitual drunkard, or (4) any known interdicted person. (Subsection 16-6-13.1(8)). If Subsection 16-6-13.1(9) had been intended to apply to The Club, it should have been listed among the restrictions of Subsection 16-6-13.1(8) and should have used a term such as "sell" rather than the term "purchase."

Finally, the new provision (Subsection 16-6-13.1(9) governs only the purchase of liquor. Unlike the other restrictions set forth before it, Subsection 16-6-13.1(9) does not govern activities of the licensee or of the Commission. Rather, it is directed solely to the activities of the purchaser.

Under that provision, an individual violates the Liquor Control Act by purchasing liquor from a club without first complying with membership requirements. Yet, the Commission erroneously found the section to apply to the licensee.

In State, in Interest of Goodman, 531 P.2d 478 (Utah 1975) this Court rejected a position similar to that taken by the Commission. In Goodman, the evidence demonstrated that appellant, a minor, was intoxicated. At a hearing, she was found to have violated certain criminal provisions, among which was Utah Code Annotated Section 32-7-15 which provided:

> (1) No person shall sell or supply alcoholic beverages to any person under the age of 21 years. (Emphasis Added).

Reversing the trial court, this court held:

> Evidence of intoxication does not show nor intend to show a violation of the statute above set forth. It is quite evident from a reading of the statute that it deals with an entirely different subject matter. The Court nevertheless found Joanie guilty of violating that provision. The Court was in error in that finding. Id. at 479. (Emphasis added).

Likewise, in this case, the Commission misinterpreted subsection 16-6-13.1(9) to conclude that it prohibited club activity. The section's only prohibition against club sale is clearly set forth in the immediately preceeding subsection which The Club has not violated. Subsection 9 simply does not speak or add to any prohibited club activities. The Commission erred in finding otherwise.

CONCLUSION OF POINT II

Because the Commission purported to base a suspension upon a statutory provision which proscribed purchase by individuals rather than sales by the club, the finding of a violation must be invalidated, and the penalty imposed by the Commission must be vacated.

POINT III

IN ENACTING REGULATION A96-01-5(6)(a), THE COMMISSION EXCEEDED ITS AUTHORITY IN PURPORTING TO REGULATE ACTIVITY NOT OTHERWISE PROSCRIBED IN THE STATUTES, AND FAILED IN ANY EVENT TO FIX STANDARDS FOR WHAT CONDUCT IS PROHIBITED.

Under the Liquor Control Act, the Commission is given broad power to control the "possession, sale, transportation and delivery of alcoholic beverages. . ." Utah Code Ann. §32-1-6(c). The Commission has the general power to "grant, refuse, suspend or cancel permits or licenses for the purchase sale or use of liquor." (Id. §32-1-6(d)) In that same section, the Commission is charged with maintaining a policy manual which shall include as a minimum "the basis upon which decisions will be made for granting or revoking permits or licenses. . ." (Id. §32-1-6(l)(i)) Finally, under Section 32-1-7, the Commis has power to make regulations "not inconsistent with this act."

Regulation A96-01-5(6)(a), which is the regulation that Club Stanyon Street was found to have violated, provides:

> "No person shall be granted the use of the premises of the locker club except members, guests and visitors."

Regulation A96-01-5(6)(a) must fall. It is not a legitimate object of the Liquor Control Act, and as applied it is consistent with both the Liquor Control Act and due process requirements.

The Commission has no authority to regulate the activity it seeks to control. Regulation A96-01-5(6)(a) does not specifically control the possession sale, transportation, delivery or even the purchase of alcoholic beverages. Rather, the regulation purports to control a wide range of otherwise acceptable activity, a control and breadth which the Commission itself rejects. Purportin to restrict the "use" of a locker club premises, the regulation employs a term so general, that in recent instances even the Commission has questioned its utility. Thus, the Commission's own policy has been not to find a violation f

"entry" and other uses outside the licensee's control have frequently occurred. In a hearing held November 15, 1978, at p.28 of the Transcript, the Chairman of the Utah Liquor Control Commission, Mr. J.P. O'Keefe, made the following statements:

> THE COMMISSIONER: Let me ask you a question. This thing all gets to the matter of entry. Now, I don't know. Ever since I've been on this Commission, I've been raising the roof about this entry business. This doesn't impress me a bit. Is there anything in the law that predicates entry?
>
> . . . .
>
> THE COMMISSIONER: Yes. But the use of the club, the fact that anyone can walk into the Country Club, the Alta Club, the Ambassador Club, anyone can walk into them. A thief can walk into them.
>
> . . . .
>
> THE COMMISSIONER: This is a waste of time on things like this . . . . What it amounts to in my estimation is a premises check in which nothing happened. I think Law Enforcement ought to make a note of this. I've gone through it so many times before. I'm in no way condoning what has happened here, but this business of taking time with all this nonsence about someone getting into a place --

According to its own statements, the Commission is no longer enforcing Regulation A96-01-5(6)(a) as written. Even if the Commission had authority to promulgate such a regulation, as applied, it is inconsistent with the Liquor Control Act, and is therefore, void. To the extent that the Regulation would allow the Commission to exercise unlimited and unfettered discretion in categorizing prohibited activity on an ad hoc basis, it is void both under Constitutional due process requirements, and under the statute by which the Commission is charged with promulgating standards for its decisions in revoking licenses. No such standards have been set.

In Giaccio v. Pennsylvania, 382 U.S. 388, 15 L.ed 2d 477, 86 S.Ct 561, the Court stated:

> "A statute fails to meet the requirements of the due process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits, or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each case." Id. at 450.

In the case at hand, Regulation A96-01-5(6)(a) is so vague and standardless that it leaves private clubs uncertain as to the conduct it prohibi and it left the Commission free to decide, without any legally fixed standards what is prohibited and what is not prohibited in each case, and it is submitted that not only was the Commission interpreting the regulation differently in each case that was brought before it, but each liquor agent was interpreting it differently in determining whether or not to bring charges against the various clubs.

One other factor which should be considered is that each club has its own governing body to determine how its premises and facilities may be used. Many clubs have golf, tennis, swimming, bowling and dining facilities, and the governing body of the club is, or should be, free to determine how the premises of those facilities may be used. However, if Regulation A96-01-5(6)(a) is interpreted literally, as has been done against the Club Stanyon Street. then it would be a violation of the liquor laws (regulations) of this state for a clu to permit a non-member to play golf or tennis on the club premises, even if the non-member never consumed an alcoholic beverage. It is clear that the Legislature did not intend to give such broad powers to the Utah Liquor Control Commission, and that the Commission has exceeded its powers by adopting Regulation A96-01-05(6)(a). Therefore, the regulation is fatally overbroad because the Commission has failed to focus precisely on the perceived evils it wishes to combat.

CONCLUSION OF POINT III

The regulation must fall for want of proper authorization and because it is vague and does not properly apprise the club of the prohibited activity. The commission has failed to focus precisely on the perceived evils it wishes to combat and has failed to set forth the basis upon which a decision will be made for revoking a license for its violation. The Commission's application of the regulation is also inconsistent with the Liquor Control Act and violates due process. Therefore, it is respectfully submitted that the decision of the Commission must be reversed and its order must be vacated.

POINT IV

WHERE THERE WAS NO INTENT TO VIOLATE THE LIQUOR CONTROL ACT OR THE REGULATIONS THEREUNDER, AND WHERE THERE WAS NOT EVEN ANY KNOWLEDGE OF THE ALLEGED VIOLATION BY ANY OFFICER OR OTHER OFFICIAL OF THE CLUB, THE COMMISSION MISINTERPRETED AND MISAPPLIED THE LAW BY FINDING A VIOLATION BY THE CLUB STANYON STREET

If the alleged violations did in fact occur, there was certainly no intention to commit the violations, nor was there even any knowledge that the violations had occurred by any officer, director, or even any employee of the Corporation, but rather they were just simple human errors by waitresses within the Club.

The sale of alcoholic beverages in a private club holding a license to sell such alcoholic beverages wasnot, per se, a violation of the Liquor Control Act. Every week there were between 3,000 and 6,000 valid transactions in the Club wherein alcoholic beverages were legally and lawfully sold to members of the Club.

The Club clearly attempted to comply with the law, and a witness who was an employee of the Liquor Division testified that on seventeen (17) attempted

inspections in the eighteen (18) months prior to the alleged incidents in this proceeding, and at least three (3) attempted inspections between the incidents and the time of the hearing, liquor agents attempted to gain admittance to the C[illegible] but they were either turned away or did not note any violations. (T.43 and 62).

One of the alleged purchases was made at the height of the evening rush at 7:30 p.m. from a waitress of three to four years who was normally very concientious, and the other was allegedly made by a waitress on her first day of employment after she came back from the restroom and was told by the bartende to serve the drink to a person whom the waitress could reasonably have presumed had been verified as a member by the bartender. Each of the alleged incidents occurred because of simple human error or oversight, and there was no evidence presented at the hearing, and there was not even any allegation or insinuation that any officer, director, manager, any policy making or responsible official encouraged or even knew of the alleged violations. In fact, Mr. Roy Kohler, the manager of the Club, testified that he did not even have any knowledge of the alleged violations until five or six weeks after they had allegedly occurred

Even if the statutory prohibition which the Commission purports to apply were addressed to the alleged actions of the Club Stanyon Street, the legislature has specifically required that the lack of intent to violate such la is a defense. Because the provisions setting forth violations of the Liquor Control Act are parallel in their application to both administrative and crimina proceedings, interpretations regarding elements of such violations and defenses thereto which are expressly set forth in either chapter should be applied unifor

Under the legislative scheme, lack of intent is an absolute defense to finding a criminal violation. Section 32-8-31, Utah Code Annotated, 1953, as amended, provides:

> If any prosecution under this act for the sale or keeping for sale or other disposal of alcoholic beverages, or the having, giving, purchasing, or consuming of alcoholic beverages, it shall not be necessary that any witness should depose to the precise description or quantity of the alcoholic beverages sold, disposed of, kept, had, given, purchased, or consumed, or the precise consideration, if any, received therefore, or to the fact of the sale or other disposal having taken place with his participation or to his own personal or certain knowledge, but the burden of proof shall be upon the Defendant to show lack of knowledge or consent to illegal use. (Emphasis Added).

In effect, the legislature has restated the common law that intent is a necessary element of such violations. Unless a different standard is clearly expressed, such legislative policy applies to administrative proceedings as well.

Although an administrative proceeding need not apply the standard of criminal prosecutions, i.e., beyond a reasonable doubt, to find a violation, it may not find a violation in the total absence of an essential element. In the proceeding before the Commission, the Club introduced uncontroverted evidence that there was no intent, knowledge or consent by management, and no intent, knowledge or consent even by the waitresses, to any purchases from or in the Club which were not fully in accordance with the law. Indeed, the only employees involved in the transactions were not shown to have known or consented to the so-called "illegal sales." Management was not shown to have known, and there is no evidence of recklessness.

Although the Commission has wide discretion in imposing its sanctions, in fact, it may not find a violation for human error or oversight absent an intent or faulty precautionary measures of the Club or its management. To do so would involve an inconsistent application of the same provisions in two different arenas without statutory authority, without notice of such treatment, and in violation of The Club Stanyon Street's right to due process.

Further, the Commission's cause is not advanced if it argues that the statute is unclear with regard to the mandated administrative interpretation to permit it to purportedly exercise its discretion and impose strict liability under its rules and regulations §A96-01-5(6)(a). Rather, such administrative interpretation must be expressly set forth under the statute, or for the sake of argument the regulations promulgated thereunder. Even if the Commission had authority to dispense with the element of the intent, it may not do so without prior notice defining such policy so as to apprise persons of the required conduct. Yet, the effective regulation, A96-01-5(6)(a) under which the Commission purports to find a violation makes no mention that intent is not a necessary element. By contrast, the Commission regulations do provide that violations of regulation A96-01-3 which governs manufacturers, producers and wholesellers of alcoholic beverages shall not require intent. As part of that regulation, the Commission has promulgated regulation A96-01-3(5), which provides:

> Any violation of the letter or spirit of this regulation, either intentional or otherwise, shall be sufficient reason for the immediate discontinuance of all business relations between the Utah Liquor Control Commission and the offender, and the Utah Liquor Control Commission shall be sole judge as to what activities shall constitute such violation. (Emphasis added).

CONCLUSION OF POINT IV

There was not even an allegation in the charges or at the hearing of any intent or knowledge, and the evidence and even the findings thereon would not support the conclusion that the necessary element of intent existed. The evidence of the efforts of club management to prevent unauthorized purchases was uncontroverted, and the record was uncontroverted that the alleged sale was at the very worst the result of an error or oversight by cocktail waitresses who knew the club rules, but for some inexplicable reason, failed to heed them. The evidence does not support a finding of a violation

POINT V

THE COMMISSION DENIED DUE PROCESS OF LAW TO THE CLUB STANYON STREET BECAUSE PETITIONER HAD A PROCEDURAL RIGHT TO DISCOVERY, BUT THAT RIGHT WAS DENIED BY THE COMMISSION WHEN IT REFUSED TO PERMIT DISCOVERY.

The State is given wide latitude in the exercise of its police power to regulate and control the use and sale of liquor. However, in effecting and enforcing such regulation, the State, or in this case, its duly constituted Commission, must follow general due process requirements. Also, the Commission must follow the regulations which it promulgates as well as the applicable statutes.

A cardinal procedural right in a state administrative hearing is the right to prepare the Commission's own rules and announced policies recognize that right. Paragraph 2, page 6 of the policy manual provides:

> The Commission may immediately revoke or suspend a license . . . if after a hearing at which the licensee receives every opportunity to defend himself, the Commission is convinced that the violation of the liquor laws or regulations has occurred. (Emphasis added)

Rules of Procedure, Rule 2(3) provides:

> Right of Parties.
> (a) All parties shall be entitled to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the proceeding. (Emphasis added).

Rules of Procedure, Rule 3(1)(1) provides:

> (1) Initiation of Formal Hearing.
> (a) By the Commission. The Commission may initiate a formal hearing upon its own motion to determine matters within its adjudicatory authority. If the hearing is directed toward a respondent, it shall serve on the respondent an order to show cause or other notice or order suitable to the purposes of the hearing which shall be set forth in ordinary and concise language the acts or omissions with which the respondent is charged, or the issues to be determined at the hearing, to the end that the respondent will be able to prepare his or its defense. The notice or order shall specify the statutes and rules involved in the proceeding.

Under the Commission's regulations, the right to prepare includes the right to discovery. (See Rules of Procedure, Rule 8(14) which provides for Depositions.) In this case, petitioner sought to exercise its right to prepare and to discover by seeking an early visual inspection of the agents and by also submitting written Interrogatories and Requests for Production of Documents in accordance with the Utah Rules of Civil Procedure. (R.116). Those Interrogatories and Requests included matters which were necessary to prepare a defense in the case, such as asking when inspections of the Club had been made, the name of the agent making any inspections, and requesting a copy of all reports submitted on the Club by the agents. Without receiving a response to that properly filed discovery and without permitting the waitress to view the agent, there was no way the Club or its Counsel could prepare a defense. The refusal of the Commission to permit discovery was clearly prejudicial to Petitioner.

The problems which were caused by the Commission when it refused to permit discovery was explained at the hearing by Mr. Kohler, the manager of the Club, shen he was asked regarding the first alleged violation, as follows:

> Q. Now, in that capacity, have you gone back and reviewed what occurred on the night of November 14, which was the night of the first alleged violation?
>
> A. I attempted to.
>
> Q. Who was on duty at that time?
>
> A. On one alleged violation, the employee, it was her very first day. That was the first day that she had worked. And I mentioned--that was at the time--well, all right. On the--that was a girl by the name of Cathy who was an employee, full-time employee with the Bureau of Land Management. She's an extremely conscientious person, and she works part time with the Club, and she has for about three or four years. I have known her to be very diligent, conscientious. She was totally unable to reconstruct what happened six weeks ago. Our club is popular with its members, and we may have 4,000 people or 4,000 transactions in a week's time. And to ask her to reconstruct what happened six weeks before that was a virtual impossibility. I don't even know

if the gentleman was in the Club. I'm going just by word. (Emphasis added). (T.49-50).

Concerning the second alleged incident, he said:

THE WITNESS: I don't know. I can't go back six weeks and pick it out that carefully. And the waitress, of course, has no idea of what happened six weeks previous. And she would--she is a very honest person and wouldn't lie. She doesn't know. There is no way for us to know if it even happened. It was a month and a half before we were even informed of what we supposedly did.

Q. (By Mr. Davis:) Can you relate now to the second occasion or second alleged violation of November 22 and who was the waitress at that time?

A. That was a girl who had started on her very first day.

Q. And do you remember her name?

A. Yes. Pamela Hendy. That was the first day she was employed at our club.

Q. And is she still employed at your club?

A. No.

Q. Did this alleged violation have anything to do with her termination?

A. It affected it, yes.

Q. Now, did you discuss this alleged violation with her?

A. I did.

Q. And what did she have to say about the alleged violation.

A. She really--all she said is, "I've checked everybody's card like you've told me to, like I've been told to. I can't believe I served somebody without a card." And I don't know whether she did or not.

Q. Now, when did you first receive notice of this alleged violation?

A. In the first portion of January.

Q. And this was for violations which occured in November of 1978?

A. That's correct.

Q. So that was five to six weeks prior?

A. That's correct.

Q. Now, in that time you mentioned earlier, I think, that you have about 4,000 transactions per week.

A. Between 3,500 and 6,000 as an average per week.

Q. How many members of your club are there?

A. Almost 6,000.

Q. Have you attempted to go back and reconstruct in every way possible what might have happened on those occasions?

A. It is a virtual impossibility.

Q. Upon receiving the letter dated January 2, 1979, were you concerned about the time lapse at that time?

A. I was very concerned.

Q. And did you then prepare a letter addressed to the Utah Liquor Control Commission?

A. I did.

(Whereupon, Exhibit E was marked for identification.)

Q. (By Mr. Davis:) I show you what has now been marked as Exhibit Number E and ask if that is the letter that you prepared?

A. Yes.

Q. And have you ever received a response to that letter?

A. A month or so later, I believe, I received a letter saying, "It is not our policy to do this."

No, I received a letter that said, "Your request has been forwarded to Liquor Law Enforcement."

Q. And have they ever responded?

A. I've had no response of any sort.

Q. Have you been able to have your waitresses view the agent that allegedly made a purchase in your--

A. No. (Emphasis added) (T.50-53).

The Commission chairmen has himself recognized the problem when the employee is not immediately confronted:

> "It seems to me that the Liquor Law Enforcement must be prepared to confront the club officials at the time the offense is detected. This point has been brought up on other occasions, but apparently all that has happened is that within a day or two of the offense, the club is notified that an offense has occurred. I recognize that there are security problems involved. One of these is the identification of agents and the other is the risk of immediate reprisal (physical harm) against the agents.
>
> Because of serious financial penalty that can be imposed on an offender, I believe that the protection of the agent's identity is not a substantial argument. As to the risk of physical reprisal, I suggest that any competent law enforcement agency can handle this problem, since it is a risk that goes along with the job."
>
> Accordingly, I suggest that you and the Attorney General get together with Liquor Law Enforcement with a view toward removing this persistent weakness in the prosecution of violations of the State liquor laws. (O'Keefe Memorandum to Kenneth F. Winn dated 11/20/78)." (Emphasis added).

In the memorandum quoted above from the Chairman of the Commission, he was concerned about a delay of a day or two, but in this case there was a delay of almost six weeks.

CONCLUSION OF POINT V

Despite the dangers, in this case, the State set up a situation where one of a myriad of like transactions became the focal point of inquiry, but where only the state knew the participants. The situation could not have been better designed to inevitably lead to the conclusion reached: Inconclusive recollection by the employee and lack of a meaningful right to cross-examine the agents. This procedure did not afford due process. Petitioner is entitled to have the Commission's Order vacated on this ground alone.

CONCLUSION

This is a case of an administrative agency abusing the rights of the parties it regulates. It is also a case which cries out for the exercise of this Court's constitutional power to control the inferior tribunals of the State. Many of the abuses and denials of rights demonstrated by the record, by the Petitioner on file and by this brief are of serious and irremedial, incorrectable magnitude, any one of which would constitute grounds for vacating the Commission's order.

Other matters complained of, might in isolation, be viewed as inconsequential, harmless or trivial. On examination of the whole case, however Petitioner submits that the Court can arrive at the following conclusions:

In this case, the Commission repeatedly ignored its own regulations.

In this case, the Commission was blind to Petitioner's rights to administrative due process, to freedom from warrantless searches, and to substantive due process.

In this case, the Commission permitted evidence obtained in searches made without a search warrant or without even following its own statutes relating to presenting identification before performing any searches, it refused to permit discovery, it followed a statute which does not proscribe any activity of The Club, it enacted and allowed a regulation which far exceeded its administrative powers, and it failed to allege or find any knowledge, consent or intent when such a finding is necessary before a violation may be found.

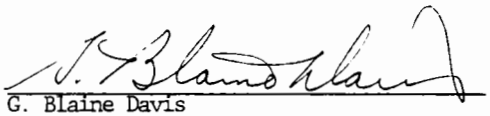
The sum and substance of the Commissioner's actions in this case equal administrative lawlessness.

This Court must also provide a remedy. Petitioner submits the proper remedy is a declaration that the Commission has denied Petitioner rights of su..

importance and magnitude and in contexts which are incapable of corrective action at this time. No rehearings can care for substantial errors and abuse. The order of suspension must be nullified and vacated and the matter closed.

DATED this 29th day of February, 1980.

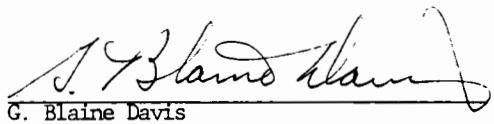
MORGAN, SCALLEY & DAVIS



G. Blaine Davis

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Petitioner to John McAllister, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah, 84114, postage prepaid, this 29th day of February, 1980.



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